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DOCKET NO

DOCKET NO. 01-00216

OFFICE OF THE
EXECUTIVE SECRETARY

Respondent Talk.com Holding Corp. d/b/a Talk.com (“Talk.com” or the “Company”),¹ by its attorneys, hereby requests, pursuant to Tenn. Comp. R. & Reg. 1220-1-2-.11(9), that the TRA compel the Consumer Services Division (“CSD”) to provide full and complete responses to Talk.com’s discovery requests discussed below. The CSD should be compelled to provide the requested information and documents because the requests are narrowly tailored and address information that is relevant to Talk.com’s defense of the allegations set forth in the Show Cause Order.

On January 22, 2002, the Consumer Services Division responded to Talk.com's First Set of Interrogatories and First Set of Requests for Production (collectively, the "Discovery Requests"). Although the CSD responded to many of Talk.com's Discovery Requests, it refused to respond in three areas. First, the CSD refused to provide documents and information requested concerning four types of consumer complaints

1 On April 9, 2001, Talk.com Holding Corp. changed its name to Talk America Inc. On May 7, 2001, Talk.com filed a request for name change to the TRA. On June 12, 2001, the Directors voted to defer a ruling on Talk.com's request to change its name and the TRA issued an order deferring such on October 12, 2001. *See Order Deferring a Ruling on Talk.com Holding Corp's Notice of Name Change* Docket No. 01-00410. Outside of Tennessee, Talk.com does business under the name "Talk America" in all states except Indiana (local service request pending; long distance name change approved) and Texas (name change awaiting final approval).

relevant to the issues in this proceeding. Second, the CSD refused to provide documents and information concerning billing errors relevant to the CSD's cramming allegations in this proceeding. Third, the CSD refused to provide documents and information concerning statements made by its principal witnesses, including CSD Division Chief Eddie Roberson, in public and private meetings involving other state and federal regulators. These statements are relevant to show possible bias, and for other permissible impeachment purposes, with respect to a witness expected to be one of the CSD's principal witnesses in this proceeding. For the reasons explained below, the TRA should compel the CSD to respond to each of these requests.

The applicable legal standard for discovery in contested cases is set forth in Talk.com's Brief in Support of Request to Take Depositions of Complaining Witnesses, filed January 14, 2002, and in Talk.com's Opposition to the Consumer Services Division's Motion to Compel, filed February 13, 2002. Talk.com respectfully refers the Authority to those filings for additional information.

Each discovery request to which Talk.com seeks a response is discussed below.

II. SPECIFIC DISCOVERY REQUESTS

REQUESTS RELATING TO CONSUMER COMPLAINTS

Talk.com submitted the following requests related to consumer complaints filed with the TRA:

Interrogatory No. 5. Identify each and every complaint filed in Tennessee that concerns the use of a promotional check issued by a telecommunications service provider other than Talk.com. Identify the person(s) who participated in the analysis, investigation, review and summary of the complaints filed concerning promotional

checks. For each person(s) describe the activities this person performed and the conclusion, if any, reached by the staff concerning the merits of the complaint.

Document Request No. 13. Any and all documents used by the Consumer Services Division to calculate the number complaints received in the "billing" category for the Consumer Services Division monthly report for each month during 2000 and 2001, including, but without limitation, copies of all complaints included in this category.

Document Request No. 14. Any and all documents used by the Consumer Services Division to calculate the number of complaints received in the "delayed installation" category for the Consumer Services Division monthly report for each month during 2000 and 2001, including, but without limitation, copies of all complaints included in this category.

Document Request No. 15. Any and all documents used by the Consumer Services Division to calculate the number of complaints received in the "service" category for the Consumer Services Division monthly report for each month during 2000 and 2001, including, but without limitation, copies of all complaints included in this category.

The CSD objected to each Request on the ground that the information is not relevant to any issues raised in the proceeding. Contrary to the CSD's contention, however, these requests relate to the existence of industry wide errors and problems which are relevant to Talk.com's defenses in this action.

Interrogatory No. 5 seeks information relating to promotional check complaints filed by consumers against other carriers in Tennessee. As Talk.com explained in its

Initial Response to the Show Cause Order,² many of the 15 alleged instances of improper promotional check solicitations involve good faith errors resulting from mismatches of customer names, addresses and telephone numbers. For example, despite Talk.com's efforts to obtain the most reliable lead lists available, despite the fact that it "scrubs" these lists against information available to Talk.com, and despite the fact that Talk.com asks the consumer to correct any errors that remain, in 11 of the 15 instances, an error appears to have gone uncorrected and undetected. *Initial Response* at 18-21. These errors can result from a variety of causes, including (i) subscribers with the same or similar names, (ii) target customers who previously had an association with the person or phone number switched, (iii) complainants who know the target customer or who had a previous association with the target and/or the address to which the check was mailed, and (iv) other data errors. *Id.* Talk.com contends in its defense that these types of errors are common in promotional check solicitations and are, to some extent, unavoidable. Talk.com seeks information on similar complaints filed against other carriers, as well as the results of the CSD's investigation of such complaints, in order to obtain evidence relevant to that contention.

Similarly, Document Requests 13, 14 and 15 seek documents, including customer complaints, used to support certain categorizations of complaints included in the CSD's monthly reports to the TRA. *See, e.g.,* Consumer Services Division Monthly Report – November 2000 at 2 (listing Regulated Utility Complaints by Type). Specifically, Talk.com seeks information on the complaints categorized as "billing," "delayed installation," and "service" complaints. These complaints (and all other documents used

² Initial Response of Talk.com, Docket No. 01-00216 (filed February 19, 2002) (*Initial Response*).

by the CSD to calculate or report these complaints) are relevant to specific defenses raised by Talk.com.

Complaints in the “billing” category are relevant to the CSD’s allegations of “cramming” by Talk.com, particularly those that demonstrate problems with receiving BellSouth “line loss reports,” problems in implementing purported cancellations of local, intraLATA or long distance service through the incumbent LEC, and problems relating to good faith billing errors that are corrected by the company. Each of these issues appear to be involved in the cramming incidents asserted by the CSD.

Complaints in the “delayed installation” and “service” categories, in addition to being potentially relevant to the cramming allegations, also are relevant to the CSD’s calculations of the number of days of each slamming violation. Specifically, although Talk.com contends that the CSD has misinterpreted the legal standard by converting a single act into multiple acts spanning hundreds of days in some cases (*see Initial Response* at 72-74), the information is relevant to the extent a number of days calculation is relevant at all. CSD seeks to require Talk.com to pay a penalty for each day of delay by the subscriber, the subscriber’s carrier and/or the subscriber’s LEC in installing replacement service. Complaints concerning delayed installations and “service”-related complaints both could reveal information that supports Talk.com’s claim that delays of these types are outside of its control.

REQUESTS RELATED TO CRAMMING ISSUES

Talk.com submitted the following requests to obtain information concerning instances of improper billing and collection for services in Tennessee:

Interrogatory No. 17. Identify all proceedings, formal or informal, in which the TRA has examined or investigated billing errors, including but not limited to double

billing and mistaken billing, by BellSouth or by unaffiliated local or long distance carriers.

Document Request No. 16. Any and all notices, memoranda, or other records relating to billing errors by other telecommunications service providers in Tennessee, including, but not limited to, errors by AT&T or BellSouth.

The CSD objected to these requests as irrelevant. However, both requests are relevant to determine both the extent and type of billing errors that commonly occur in Tennessee and the legal standard that the CSD applies to the investigation of such errors. With respect to Interrogatory No. 17, this request seeks the identification of all proceedings, whether docketed or informal, in which the TRA has investigated certain types of billing errors. The specific billing errors identified are errors raised in the CSD's cramming allegations against Talk.com: double billing or mistaken billing. Talk.com alleges in its Initial Response that many of the instances of alleged cramming are caused by BellSouth's failure to deliver timely and accurate billing information to CLECs, including particularly, "line loss" reports. A response to this interrogatory will enable Talk.com to investigate the extent to which BellSouth's delays are attributed to similar billing problems experienced by other CLECs, as well as to the reasonableness of Talk.com's billing based upon information received from BellSouth.

With respect to Document Request No. 16, notices, memoranda or other records of billing errors by carriers are relevant to determining whether Talk.com knew or "reasonably should have known" that certain billing was made without the subscriber's authorization. The extent to which other carriers, including AT&T or BellSouth, are experiencing similar problems may establish that Talk.com's problems are common and

that it acted reasonably. In addition, this request is designed to elicit information relevant to the legal standard the CSD has used in investigating billing errors by AT&T and BellSouth. The CSD may not apply different legal standards to the carriers it investigates, and the legal standard the CSD applied in investigating notices by BellSouth or AT&T may provide the basis for admissions or other evidence relevant to the evaluation of the jurisdiction and/or merits of the billing errors alleged against Talk.com.

REQUESTS RELATING TO STATEMENTS BY THE CSD'S WITNESSES

Talk.com submitted the following requests to obtain information relevant to the testimony of witnesses the CSD is likely to call in this case:

Interrogatory No. 16. Identify all communications and/or presentations to the FCC, NARUC, or any other state regulatory or consumer services representative body (public service commission, public utilities commission, attorney general's office etc.) in which Talk.com is the subject of the communication. Identify each person(s) who participated in the communication, the type of communications (*i.e.* letter, meeting, phone call, etc.), the date of the communication and the specific subject of the communication.

The CSD has objected on the ground that this information is irrelevant to the issues in this case. However, the CSD has identified three staff members, including its Division Chief, as witnesses it is likely to call in support of its case. *See* CSD Response to Interrogatory No. 20. Communications made by these witnesses to third parties in public and private forums are relevant, discoverable communications under the TRA's discovery rules. In particular, these communications – which clearly are not privileged since they were made to persons outside the TRA – may be relevant, at a minimum, for purposes of impeachment should any of these individuals be called to testify in this case.

Evidence that may be used to demonstrate admissions, bias, and/or improper motives could be identified through a response to this Interrogatory. In addition, this information may be relevant to Talk.com's defenses in this case. For example, to the extent that the subject of any communications relates to the use of promotional checks, common problems in connection with such checks, or relates to disputes of the nature alleged with respect to the telemarketing solicitations, the communication would be relevant and discoverable. The CSD's refusal to answer this request has no basis.

CONCLUSION

For the foregoing reasons, the CSD should be compelled to respond to Talk.com's
Discovery Requests described above.

Respectfully submitted,

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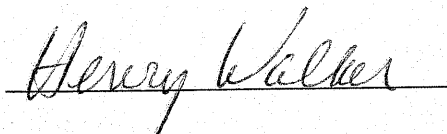
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been delivered via fax or hand delivery and U.S. mail to the following on this the 19th day of February, 2002.

Timothy C. Phillips, Esq.
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A handwritten signature in cursive script, appearing to read "Henry Walker", is written over a horizontal line.